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IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEVADA

UNITED STATES OF AMERICA

Plaintiff,

v.

KENNETH J. MCKENNA,

Defendants.

Civil No. CV-N-05-0624 BES (VPC)

REPLY TO DEFENDANT'S OPPOSITION
TO UNITED STATES' MOTION FOR
SUMMARY JUDGMENT

The United States of America, by the undersigned counsel, submits this memorandum in reply to the Amended Opposition To Motion For Summary Judgment filed by the defendant in this matter.

STATEMENT OF THE CASE

As set forth in detail in the Memorandum In Support of the United States' Motion For Summary Judgment, this action was brought by the United States to reduce to judgment federal income tax and trust fund recovery penalty assessments against defendant Kenneth J. McKenna. The federal income tax assessments made against the defendant for the years 1992, 1993, 1996, 1997, 1998, 1999, 2001 and 2002 were based on the income tax reported due by the defendant on the federal income tax returns that he filed with the Internal Revenue Service (IRS). The defendant has failed to pay the outstanding federal income tax assessments for the years 1992, 1993, 1996, 1997, 1998, 1999, 2001 and 2002. The defendant did not dispute these facts in his opposition to the United States' motion.

1 In addition, the trust fund recovery penalty assessments made against the defendant for the
2 periods June 30, 1998, September 30, 1998, December 31, 1998, March 31, 1999, June 30, 1999,
3 September 30, 1999, December 31, 1999, March 31, 2000, June 30, 2000, December 31, 2001, March 31,
4 2002, June 30, 2002, and September 30, 2002, were based on the Form 941 quarterly employment tax
5 returns filed by the defendant. The defendant has failed to pay the outstanding federal employment tax
6 liabilities assessed against him for these periods. The defendant did not dispute these facts in his
7 opposition to the United States' motion.

8 In his opposition, the defendant has alleged that in preparing his 2006 federal income tax return,
9 his accountant determined that there was an error in his office's QuickBooks accounting system which
10 resulted in errors in calculating his net income for the 2006 tax year. See Defendant's Opposition, p. 3.
11 Defendant alleges that the error has been occurring since his office began utilizing the system and as a
12 result he has been over-reporting his income. Id. Defendant maintains that it would be premature to
13 grant the United States' motion for summary judgment until he can determine the extent of the error.
14 However, defendant's allegations fail to raise an issue of material fact and therefore, summary judgment
15 should be entered in favor of the United States in the amount of the balance due on the federal income
16 and employment tax assessments made against the defendant.

17 ARGUMENT

18 Summary judgment is appropriate when the movant demonstrates that "there is no genuine issue
19 as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ.
20 P. 56(c); Owen v. Local No. 169, 971 F.2d 347, 355 (9th Cir. 1992). The party moving for summary
21 judgment "bears the initial responsibility of informing the district court of the basis for its motion, and
22 identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on
23 file, together with the affidavits, if any," which it believes demonstrate an absence of a genuine issue of
24 material fact. Celotex v. Catrett, 477 U.S. 317, 323 (1986). If the moving party meets its initial
25 responsibility, then the burden shifts to the opposing party to establish that a genuine issue as to any
26 material fact actually does exist Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586
27 (1986).

1 As set forth in detail in the Memorandum in Support of the United States' Motion For Summary
2 Judgment, the United States submitted the Certificates of Assessments and Payments, Forms 4340, for all
3 of the outstanding federal income and employment taxes at issue in this matter. Forms 4340 are the
4 appropriate means of establishing an assessment, *Hughes v. United States*, 953 F.2d 531, 540 (9th Cir.
5 1992), and show that the federal tax liabilities were properly assessed against the defendant, that the
6 notices and demand for payment were properly sent, and that the defendant is presumptively liable for
7 the unpaid taxes, interest, penalties, and other statutory additions identified thereon. *Koff v. United*
8 *States*, 3 F.3d 1297, 1298 (9th Cir. 1993) ("It is settled in this circuit that [Forms 4340] are 'probative
9 evidence in and of themselves and, in the absence of contrary evidence, are sufficient to establish that . . .
10 assessments were properly made'" (citations omitted); *Huff v. United States*, 10 F.3d 1440, 1145-47 (9th
11 Cir. 1993); *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993).

12 In his opposition, the defendant does not dispute that the amount of income tax assessed on the
13 Forms 4340 is the same amount that the defendant reported on the federal income tax returns that he filed
14 with the IRS for the years 1992, 1993, 1996, 1997, 1998, 1999, 2001, and 2002. In addition, the
15 defendant does not dispute that the amount of the trust fund recovery penalty assessed was based upon
16 the employment tax liabilities reported by the defendant on the Forms 941 filed by the defendant for
17 Kenneth James McKenna, Inc. The only allegation the defendant makes in his opposition is that for his
18 2006 tax year, a year not at issue in this suit, his accountant discovered an error in his office accounting
19 system which impacted his net income for his 2006 tax year. From this allegation, the defendant
20 concludes that there must be an error in the net income calculated for his prior years, and the amount
21 owed for his outstanding federal income and employment tax liabilities is incorrect. The defendant's
22 conclusion is nebulous and not supported by any facts. The defendant fails to allege the year in which he
23 started using the QuickBook accounting system in his office, what the precise error is, or how the error
24 impacted the calculation of his net income. Defendant's conclusory allegations fail to establish a
25 genuine issue of material fact as to the liabilities at issue in this action.

26 In his opposition, the defendant maintains that because of the above there is a dispute as to the
27 amount owed so summary judgment cannot be entered in favor of the United States. However, defendant
28

1 has submitted no facts which would counter the facts submitted by the United States. All the defendant
2 has submitted is his allegation that there was an error in his office accounting system for tax year 2006
3 and therefore, there must be an “error” in prior years. The defendant does not specify how many years
4 back the error would go and how it would even effect the income and employment tax liabilities at issue
5 in this matter. Moreover, given the wide use of QuickBooks, it is noteworthy that defendant has not
6 come forward with any other reported allegation of similar errors. In addition, the defendant’s
7 allegations fail to address the fact that he failed to timely pay the outstanding federal tax liabilities at
8 issue in this matter. The defendant’s opposition is based on conclusory allegations that fail to create an
9 issue of material fact. Therefore, summary judgment should be entered in favor of the United States.

10 Finally, the defendant alleges that “through the discovery process the accurate amounts owed
11 may be determined” Defendant’s Opposition, p. 6. To the extent that this can be construed as a
12 Rule 56(f) motion, defendant’s request is insufficient. First, discovery ended in this matter on March 16,
13 2007. Moreover, defendant alleges that he hired his accountant in February 2007 to complete his 2006
14 federal income tax return, due on April 15, 2007 and in the preparation of the return the error was
15 discovered. Yet, the first time that he informs the United States or this Court of the discovered “error” is
16 in response to the United States’ motion for summary judgment. In addition, in order for courts to grant
17 an opposing party’s Rule 56(f) motion, facts, not conclusions, are required. See Keebler Co. V. Murray
18 Bakery Products, 866 F.2d 1386, 1389 (Fed. Cir. 1989). Under rule 56(f), an opposing party must make
19 clear what information is sought and how it would preclude summary judgment. See Garrett v. City and
20 County of San Francisco, 818 F.2d 1515, 1518 (9th cir. 1987). In this action, the defendant has not
21 alleged facts but conclusions. As set forth above, he has not stated that his office used QuickBooks
22 during the years at issue, what the discovered error is, how it would effect his income in the prior years,
23 how it would effect the employment tax liabilities at issue, or what additional discovery is needed. The
24 defendant has failed to present the necessary facts in support of a Rule 56(f) motion and therefore, it
25 should be denied.

CONCLUSION

For the foregoing reasons, summary judgment should be entered in favor of the United States and against the defendant Kenneth J. McKenna in the amount of \$367,829.68 for the income tax liabilities, \$51,135.69 for the trust fund recovery penalty liabilities and other statutory additions from May 15, 2007.

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing REPLY TO DEFENDANT'S
OPPOSITION TO UNITED STATES' MOTION FOR SUMMARY JUDGMENT has been made this 2nd
day of July, 2007, by ecf notice addressed to:

andrea@kenmckennalaw.com

/s/ Virginia Cronan Lowe
VIRGINIA CRONAN LOWE
Trial Attorney, Tax Division
U.S. Department of Justice